Supreme Court, U.S.
FILED

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No. 96-

In the

Supreme Court of the United States

October Term, 1996

SIDNEY P. SANDERS JR.,

Petitioner,

vs.

ARNESON PRODUCTS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is an individual "disabled" for purposes of the Americans With Disabilities Act, 42 U.S.C. 12001 et seq., where he or she has bladder cancer, chemotherapy and a psychological stress reaction to that cancer condition, where said reaction is a symptom of and causally related to said cancer?

2. Is it a violation of the Americans With Disabilities Act for an employer to terminate a disabled employee's employment on the basis of his/her disability, and to refuse to reinstate said employee to his/her employment, although the employee is fully qualified to perform the essential functions of his/her job, with reasonable accommodation of his/her disability?

3. Is it error for a District Court to grant summary judgment on an employee's claim of tortious discharge in violation of public policy under the Americans With Disabilities Act where the said employee presented a prima facie claim under the Americans With Disabilities Act?

PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

The parties to the proceedings below were the petitioner, Sidney P. Sanders, Jr., and the respondent Arneson Products, Inc.

No. 96-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

SIDNEY P. SANDERS, JR.,

Petitioner,

v.

ARNESON PRODUCTS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Sidney P. Sanders, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on August 6, 1996, petition for rehearing and suggestion for rehearing en banc denied on September 30, 1996.

OPINIONS BELOW

The Opinion (A-1) of the Court of Appeals for the Ninth Circuit ("Ninth Circuit") below is reported at 91 F.3d 1351; the Order (B) of the Ninth Circuit denying the petition for rehearing is unreported, as is the Order (B) denying the suggestion for rehearing en banc.

The trial court's Order granting summary judgment is favor of Respondent (D-1) is also unreported.

JURISDICTION

The decision of the Ninth Circuit in this case was entered on August 6, 1996. Orders denying Mr. Sander's petition for rehearing and suggestion for rehearing en banc were entered on September 30, 1996. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C.S. 1254(1).

STATUTE INVOLVED

The statute involved in this case is 42 U.S.C.S. 12101 et seq., Title I of the Americans With Disabilities Act, Sections 12101 through 12117. The pertinent text is set out in the Appendix, infra, at p. E-1 - E21.

STATEMENT OF THE CASE

The instant case focuses on Respondent's violation of Petitioner's rights under the Americans With Disabilities Act ("ADA") by its termination of Petitioner's employment and refusal to reinstate Petitioner to his employer solely because of his disability.

Petitioner brought his instant suit in the Northern District of California seeking protection of his rights under 42 U.S.C. Sections 1981, 2000e et seq., as amended, and 12101 et seq. [Americans With Disabilities Act of 1990, "ADA"][1] . On February 9, 1995, the Northern District granted Respondent's motion for summary judgment and entered final judgment in Respondent's favor on Petitioner's Americans With Disabilities claim and state tort cause of action.

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[1] Plaintiff dismissed his Title VII and Section 1981 causes of action in his Response to Defendant's Motion for Summary Judgment (E. 324 n. 1). His state law claims for intentional and negligent inflection of emotional distress were dismissed earlier in this action.

The District Court had jurisdiction of Petitioner's case under 28 U.S.C. Section 1331 and 1342 to secure protection of and to redress deprivation of rights secured by 42 U.S.C. Sections 1981, 2000e et seq., as amended, and 12101 et seq. [Americans With Disabilities Act of 1990].

Petitioner began working for Respondent in January 1990. In June 1990, he became Respondent's Production Manager and held that position for the remainder of his employment. On October 19, 1992, Petitioner was diagnosed with recurrent bladder cancer and went on medical leave on October 26, 1992. On or about October 29, 1992, he underwent surgery for carcinoma in his bladder. Following surgery, he was released for work effective November 30, 1992; returned to work on December 2, 1992; and, continued to work on a part-time basis until December 19, 1992, while receiving chemotherapy for his cancer.

On December 16, 1992, Petitioner returned to his doctor and informed him that he was having a very difficult time dealing with his cancer, both emotionally and physically, and was experiencing a great amount of stress in reaction to his cancer, especially in view of the fact that his father had died of cancer eight years before and his wife had died of the same disease in 1988.

In response, Petitioner's surgeon referred him to a licensed psychologist, Dr. Purviance, who diagnosed Petitioner as having "adjustment disorder with mixed emotional features" related to his cancer (E.R. 325, 357), a common psychological reaction to a cancer condition (E.R. 565-566). Such stress is generally a temporary condition and Dr. Purviance believed it would last no more than 6 months, so that Petitioner would have been able to return to work by April 5, 1993.

As a result of this diagnosis, Petitioner and Dr. Purviance agreed upon a plan of "supportive psychotherapy" (E.R. 532-535,538, 542-543) and Dr. Purviance informed Respondent on December 21, 1992, that Petitioner needed a leave of absence for further evaluation and psychotherapy (E.R. 380). He gave Petitioner an initial estimated "release" date of March 1, 1993, which was subsequently extended to April 5, 1993.

Respondent's reaction to Dr. Purviance's December 21, 1992 note is in dispute. According to Respondent's personnel

supervisor, there was no discussion at Respondent of putting together any plan to return Petitioner to his job after December 1992. Instead, when Respondent's President was informed of the request for leave of absence, Respondent's President "hit the roof" and wanted Petitioner out and to stay out, stating that, since Petitioner was seeing Dr. Purviance, "apparently Petitioner didn't want his job." He directed his Personnel Supervisor to see what could be done to terminate Petitioner's employment. Respondent's President believed it was "ridiculous" that Petitioner was going to a doctor and wasn't at his job working. Respondent's President further told his Personnel Supervisor that he was upset that Petitioner was unable to come to work because of his disability and that a psychiatrist or psychologist would say anything and let anyone stay out of work any time.

According to other evidence, Petitioner, pursuant to Dr. Purviance's December 1992, note, and with Respondent's approval, began a temporary leave on December 20, 1992, for treatment of his psychological stress reaction to his cancer condition, with an initial return to work date of March 1, 1993.

Following December 20, 1992, Petitioner's job duties were not eliminated but reassigned to existing employees of Respondent, on the clear understanding that the reassignments were temporary only.

On February 26, 1993, Respondent telephoned Petitioner and asked when Petitioner expected to return to work on March 1, 1993. Petitioner replied the he "wasn't sure" but would check with his doctor (ER 155). Respondent then told Petitioner that he had already been replaced. Respondent never checked with Dr. Purviance before replacing Petitioner prior to February 26, 1993.

After that phone conversation, Petitioner consulted with Dr. Purviance, on or about March 2, 1993. Dr. Purviance told Petitioner that Petitioner was not yet ready to work but could return to work on April 5, 1993. Dr. Purviance so informed Respondent on March 2, 1993.

Upon receipt of the new release on or about March 9, 1993, Respondent's President told his Personnel Supervisor that, "there was not longer any job for [Petitioner] to come back to" and that Respondent "didn't want [Petitioner] back."

On or about March 19, 1993 (E.R. 394), Respondent informed Petitioner that it had received Dr. Purviance's March 2, 1993 letter but that, "as you know, your previous position has been filled. . ." Respondent's managing supervisor admitted during his deposition that he had no reason not to allow Petitioner to resume on April 5, 1993 the duties Petitioner had previously performed and could not say why that did not happen.

In its March 19, 1993 letter to Petitioner, Respondent promised him an "equivalent" position once such a position became available. However, Respondent did not give Petitioner such a position when it became available in August, 1993. Respondent has not reinstated Petitioner to date. However, his duties are still being performed today.

REASON WHY A WRIT OF CERTIORARI SHOULD BE GRANTED IN INSTANT CIRCUMSTANCES

Cancer is the number two leading cause of death in the United States today. Five thousand Americans die of cancer each year. One out of every three Americans is diagnosed with cancer in their life time. To uphold the Ninth Circuit's opinion in this case, holding that an employee with cancer who develops a psychological stress reaction to his cancer is not protected by the Americans With Disabilities Act, 42 U.S.C.S. 12101 et seq., would be a staggering blow to all these disabled Americans who seek accommodation for temporary stress reactions to their underlying disabilities, which are causally connected with said disabilities. Under the Ninth Circuit's opinion, cancer survivors and other disabled persons who develop psychological reactions to their underlying disabilities cannot be fully protected from employment discrimination by the ADA, and Title I of that statute is made a nullity. Respondent's President would then sadly be correct when he stated that it is "ridiculous" for disabled employees to seek protection under the ADA from discrimination on the basis of their disabilities (E.R. 503-511, 516-517, 620).

To fulfill the "national mandate for the elimination of discrimination against individuals with disabilities" (42 U.S.C. Sec.

12101 (b) (1)) for which the ADA was enacted, this Court must grant Petitioner's petition for Writ of Certiorari.

If the Ninth Circuit's opinion is upheld, employees who develop symptoms, such as short term stress and similar psychological reactions to their cancer or other disabilities (for example, fever, headache, pain, nausea), causally connected to those underlying disabilities (e.g., persons infected with HIV) will be without protection by the ADA from their employer's adverse employment actions. For example, a person with AIDS may have a high fever and other temporary symptoms of the HIV virus. But, this does not mean that the employee does not have AIDS and should not be protected by the ADA.

The instant petition, therefore, involves a question of exceptional importance to cancer-survivors and other, similarly situated individuals from discrimination based upon their disability. This Court has not addressed this important question of federal law but must do so if the ADA is to be fully protective of disabled individuals' rights under the ADA. The Ninth Circuit's opinion, if upheld by this Court, will greatly decrease the protections disabled persons enjoy under the ADA. This issue must be settled by this Court in a manner that fully protects disabled individual's rights under the ADA and, thereby, comports with this Court's decision in *School Bd. of Nassau County v. Arline* 480 U.S. 273 (1987).

The Ninth Circuit majority's opinion begins by acknowledging that Petitioner's "psychological disability" was a "cancer-related psychological disorder." *Sanders v. Arneson* (9th Cir., 1996) 91 F.3d 1351. Despite this acknowledgment, however, the majority affirmed the District Court's grant of summary judgment on the erroneous basis that Petitioner had "argued below and conceded on appeal" that his psychological stress was separate and distinct from his cancer. Petitioner never made that distinction, however; he never argued it at the District Court level nor conceded it on appeal. The proper issue, as stated in Petitioner's papers below and presented by this petition, is whether a psychological stress condition which is a symptom and manifestation of an employee's cancer and causally related to it is protected under the ADA as part and parcel of his cancer "disability" under the terms of the ADA.

In its decision, the Ninth Circuit majority never identified any part of the record below which, in fact, shows that Petitioner argued before the district court that his cancer and psychological impairment were "two distinct . . .disabilities." In fact, no part of the record below supports that finding.

Moreover, Respondent "fully acknowledged" that Petitioner "was disabled between October 26, 1992 and April 5, 1993. . ." and "was disabled. . .during this entire period. . ." (Answering Brief on Appeal at p. 33). Respondent repeatedly argued that, "[Petitioner]...cannot dispute the fact that [Petitioner] was disabled. . .between December 20, 1992 and April 5, 1993" (E.R. 572:5-6).

> "In the instant case the facts are undisputed that, at the time of the elimination of his position, Petitioner was. . . disabled. . ." (Respondent's Answering Brief at p. 14; emphasis added).

Respondent argued before the District Court that it was "undisputed" that "[Petitioner] commenced his disability leave on October 26, 1992. . .[Petitioner] became completely disabled once again on December 10, 1992. . ." (E.R. 575:3-12; 592 (same)).[2]

In its Answering Brief on Appeal, at p. 2, Respondent states that:

> "After a mere two and one-half weeks of part-time work (i.e., from December 2, 1992 to December 19, 1992) Petitioner again became totally disabled – this time because of emotional problems resulting from his cancer," (Answering Brief at p. 8, emphasis added).

As Petitioner's direct supervisor noted in approximately January 1993:

> "I was short. . .Sidney Sanders due to disability since October. Sidney returned part time, in early December. . . Sidney informed me 12/19, that he was having a severe stress from his illness (apparently a form of cancer) and that he would not be able to return to work as initially committed. His present medical clearance indicates 3/1/93 at the earliest." (E.R. 382, emphasis added).

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[2] Petitioner disputes and has always disputed that he was "totally" disabled during the relevant period.

There is also no factual basis to the majority's belief that Petitioner "conceded" that his cancer and cancer-related emotional impairment were "two distinct. . .disabilities." During a colloquy with Judge Rymer concerning Petitioner's leaves of absence, Judge Rymer asked Petitioner's counsel, "Cancer and emotional adjustment are two entirely different things. Right? You agree?" Petitioner's counsel replied, "Right," believing he was being asked whether two entirely different times, two entirely different leaves were in question, not whether "two entirely different disabilities" were in issue. In fact, he immediately followed up his answer by stating that the first leave (in October-November 1992) was "for cancer" and that the second leave (the leave in issue here) was "for cancer-related psychological disability;" i.e., Petitioner's psychological adjustment reaction to and manifestation of his underlying cancer condition.[3]

The Ninth Circuit held that the short duration of Respondent's psychological stress disqualified him from alleging that his stress was a "disability" and, therefore, that he is not entitled to the protection of the ADA. While the Petitioner's stress was of a short duration, it was a manifestation, a symptom of and causally related to his underlying cancer condition. As Judge Rymer stated in her dissent, Petitioner's case should have been remanded so that the characteristics of the psychological impairment could be clearly set forth: i.e., to show whether the psychological impairment was "bad enough", lasted long enough"' whether it was cured, in remission may recur or is sufficiently controlled so that petitioner could return to work on April 5, 1993; to show that his psychological disorder:

> "is so related [to his cancer] that it is - or must be treated as a 'disability' because his cancer was a 'disability' or is so distinct that it should not be." *Sanders*, *supra*, at p. 1355.

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[3] Petitioner also appealed the district court's grant of summary judgment state law claim, for tortious discharge in violation of public policy. Since Petitioner is able to state a claim under the ADA, the District Court's grant of summary judgment on Petitioner's state claim must also be reversed.

CONCLUSION

The Court of Appeals for the Federal Circuit concluded that an individual with cancer is not protected by the ADA thus defeating the purpose of the ADA. For the foregoing reasons, this Petition for Certiorari should be granted in order to implement the Congressional mandate to provide protection for people with a disability such as cancer.

Dated: December 30, 1996.

Respectfully submitted,

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Cite as 96 C.D.O.S. 5831

SIDNEY P. SANDERS, JR., Plaintiff-Appellant,

v.

ARNESON PRODUCTS, INC., Defendant-Appellee.

No. 95-15349
United States Court of Appeals for the Ninth Circuit
DC. No. CV-94-0551 SAW
Appealed from the United States District Court for the Northern District of California Stanley A. Weigel, District Judge, Presiding
Argued and Submitted May 13, 1996--San Francisco, California
Before: Arthur L. Alarcon, Robert R. Beezer and Pamela Ann Rymer, Circuit Judges.

COUNSEL

Daniel Ray Bacon, San Francisco, California, for the plaintiff-appellant.

Brain T. McMillan, Robert J. Wilger, Littler, Mendelson, Fastiff, Tichy & Mathiason, San Jose, California, for the defendant-appellee.

C. Gregory Stewart, Gwendolyn Young Reams, Vincent J. Blackwood, Karen M. Moran, Equal Employment Opportunity Commission Office of General Counsel, Washington, D.C., for amicus curiae Equal Employment Opportunity Commission.

Filed August 6, 1996.

BEEZER, Circuit Judge:

Plaintiff Sidney P. Sanders appeals the district court's summary judgment in favor of defendant Arneson Products, Inc. Sanders sought relief under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq*. for his termination while he was on leave for a cancer related psychological disorder. Sanders' appeal is timely and we have jurisdiction under 38 U.S.C. § 1291. Because Sanders was not "disabled," as that term is defined in the ADA and its implementing regulations, we affirm.

I

Sanders began working for Arneson in January, 1990, as Manager Production Control. In June 1990, he became Arneson's Production manager, and remained in that position for the remainder of his employment with Arneson. In October, 1991, Arneson consolidated two facilities. Subsequently, Arneson began experiencing severe production problems. Arneson hired a new Director of Manufacturing, Robert Carlson, and embarked upon a process of company-wide restructuring. Some jobs were eliminated, and Sanders' duties were modified.

In October 1992, Sanders was diagnosed with bladder cancer and underwent surgery. He was on leave from October 26, 1992 until December 2, 1992. Though he was originally scheduled to return to work on November 30, he did not return until December 2. He worked part-time from December 2 until December 19.

On December 18, 1992, Dr. Carlton Purviance, a licensed psychiatrist, diagnosed Sanders as suffering a psychological reaction to his cancer. Dr. Purviance informed Arneson that he had advised Sanders to take time off work, and gave an estimated "released" date of March 1, 1993.

While Sanders was on leave, other existing Arneson employees assumed Sanders' responsibilities. Sanders received full pay during his initial leave for cancer surgery, during the period he worked part-time and during the December 19-April 5 period. For a portion of the December 19-April 5 period, he received disability compensation from the State of California; Arneson reduced his salary accordingly so that his net compensation remained at the same level.

The parties disagree as to when the decision was made to terminate Sanders. Sanders argues that the decision was made in December, 1992, shortly after he went on leave for his psychological difficulties. Arneson contends that the decision was made in late February 1993.

On February 26, 1993, Carlson phoned Sanders. Sanders contends that he was told during the phone conversation the "he had already been replaced." Arneson contends that the purpose of the

phone call was to ascertain whether Sanders would be returning to work on March 1, and that upon receiving news that Sanders would not be returning on that date, Carlson informed Sanders that he could not be guaranteed a job upon his return.

On March 2, Dr. Purviance sent a note to Arneson, informing them that Sanders would be able to resume work on April 5, with no further psychological restrictions or complications. Arneson received the note around March 9. Arneson continued to pay Sanders' full salary until April 5, but never allowed him to return to work.

Sanders filed suit on February 16, 1994 seeking damages under the ADA, 42 U.S.C. § 2000e, 42 U.S.C., § 1981, and under state tort law. The district court granted Arneson's motion for summary judgment. Sanders timely filed a notice of appeal, and raises only the ADA and state-law violation of public policy issues on appeal.

II

We review *de novo* grants of summary judgment, *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 1261 (1996). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

A.

The district court granted summary judgment without comment or explanation. Arneson's motion for summary judgment argued principally that Sanders was not a "qualified individual with a disability" and therefore could not establish a prima facie case of disability discrimination under the ADA.

The ADA's general rule against discriminating against people with disabilities is found in 42 U.S.C. § 12112(a):

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[1]

To state a prima facie case under the ADA, a plaintiff must prove that he is a qualified individual with a disability who suffered an adverse employment action because of his disability. *See Stradley v. Lafourche Communications, Inc.*, 869 F.Supp. 442, 443 (E.D.I.a. 1994) (borrowing Rehabilitation Act standard); *Smith v. Upson County, Ga*, 859 F.Supp. 1504, 1514-1515 (M.D.Ga. 1994), *aff'd*, 56 F.3d 1392 (11th Cir. 1995); *Sawinski v. Bill Currie Ford, Inc.*, 866 F.Supp. 1383, 1386 (M.D.Fla. 1994). *See also Collings v. Longview Fiber Co.*, 63 F.3d 828, 832 (9th Cir. 1995) (noting the similarity of the ADA and Rehabilitation Acts and the extent to which Congress intended that interpretation of the ADA be informed by Rehabilitation Act precedent), *cert. denied*, 116 S.Ct. 711 (1996),

The issue in this case is whether Sanders was a qualified individual with a disability. Ancillary to that issue is whether the leave he requested was a reasonable accommodation. Because we determine that Sanders was not a qualified individual with a disability, we do not reach the issue whether the requested leave was reasonable accommodation.

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[1] "Covered entities" include employers with, in this case, more than 25 employees, 42 U.S.C., §§ 12111(2), 12111(5)(A). "Discriminate" is given a relevant definition in 42 U.S.C., § 12112(b)(5)(A):

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

In determining whether Sanders was a qualified individual with a disability, we need only address whether Sanders' temporary psychological impairment qualifies as a disability under the ADA. Sanders argued before the district court and conceded at oral argument before us that his cancer and psychological impairment were two distinct alleged disabilities. Only the psychological impairment is at issue in this case. It lasted from December 19, 1992 to April 5, 1993, and had no long-term residual effects beyond April 5, 1993. Sanders requested leave for the entire period of his psychological impairment. We address only the application of the ADA to this case, where the impairment is of relatively short duration and leave is requested for the entire period of impairment. We do not address whether a person is qualified for employment under the ADA if he or she requires a short period of leave as accommodation for a long-term of permanent disability.

We consider here whether Sanders' psychological impairment is a disability," as that term is used in the ADA.[2] Section 12102(2)(A) defines disability as "a physical or mental impairment that substantially limits one or more of the major life activities of the individual." The term "substantially limits" is defined in 29 CFR § 1630.2(j). Section 1630.2(j)(2) lists three factors to consider in determining whether an individual is substantially limited in a major life activity: "(I) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." Several courts have held that a temporary injury with

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[2] We note that "disability" is susceptible to a broad variety of definitions and usages. Arneson has repeatedly characterized Sanders' psychological impairment as a "total disability." This is not a concession that Sanders was "disabled" under the ADA. The ADA defines "disability" with specificity as a term of art. Hence, a person may be "disabled" in the ordinary usage sense, or even for purposes of receiving disability benefits from the government, yet still not be "disabled" under the ADA. The converse may sometimes be true as well.

minimal residual effects cannot be the basis for a sustainable claim under the ADA. *Blanton v. Winston Printing Co.*, 868 F.Supp. 804, 808 (M.D.N.C. 1994) (holding that a temporary injury with minimal residual effect cannot be a basis for an ADA claim); *Rakestraw v. Carpenter Co.*, 898 F.Supp 386, 390 (N.D.Miss. 1995) (same); *Johnson v. Foulds, Inc.*, 1996 WL 41482 (N.D.Ill. 1996) (holding that temporary mental depression does not meet the requirements of a disability). The appendix to the regulations states, "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza." 29 CFR Part 1630 App., § 1630.2(j).

Sanders' temporary psychological impairment, from December 19, 1992 to April 5, 1993, with no residual effects after April 5, 1993, was not sufficient duration to fall within the protections of the ADA as a disability.

B.

Kimbro v. Atlantic Richfield Co., 889 F.2d 869, 878-879 (9th Cir. 1989), *cert. denied*, 498 U.S. 814 (1990) is not to the contrary. In that case we held that, under a Washington state handicap discrimination law, a chronic sufferer of acute cluster migraines was "handicapped." We further held that it is "reasonable accommodation" to require an employer to grant leaves of absence during episodes of migraines so that the employee could seek medical treatment.

Kimbro involved temporary periods of leave for episodic outbreaks of an underlying permanent condition. In this case, by contrast, Sanders suffered a single episode of a temporary condition, and the leave requested was for the entire duration of the condition. It is consistent with *Kimbro* to hold that Sanders' psychological disorder was not a disability. Because we do not here reach the issue of reasonable accommodation, it is unnecessary to consider further that aspect of our holding in *Kimbro*.

III

Sanders also appeals the district court's grant of summary judgment on his claim under state law for tortious discharge in violation of public policy. Arneson argues that this claim falls with Sanders' ADA claim. *See Jennings v. Marralle*, 8 Cal. 4th 121, 135-136 (1994) (no public policy claim against employers who have not violated the law). We agree.

IV.

We hold that Sanders' temporary psychological impairment was not a disability under the ADA. Arneson's request for attorney's fees under 42 U.S.C. § 12205 is denied.

AFFIRMED.

RYMER, Circuit Judge, dissenting:

It may be that my colleagues are absolutely correct, that Sanders's psychological impairment associated with his cancer is not a "disability" under the ADA because it wasn't bad enough and didn't last long enough, but I have trouble finding support for (or against) this conclusion in the record. There is no evidence about whether the condition was cured, was in remission, or was just sufficiently controlled that Sanders could return to work on April 5. Nor does the record shed light on whether Sanders's psychological disorder, which was associated with his cancer, is so related that it is -- or must be treated as -- a "disability" because his cancer was a "disability," or is so distinct that it shouldn't be. Likewise, the record is unclear as to whether the cancer, or the psychological impairment that followed in its wake, may recur. In short, we know next to nothing about its characteristics. For this reason, it seems to me that the record has to be more fully developed before it can be concluded as a matter of law that Sanders suffered no disability for purposes of the Act.

Both parties agree that Sanders was disabled in the sense that he could not work at all between December 19 and April 5. Equally, both agree that Sanders did work, and worked well before his leave for cancer surgery October 26, 1992; no one quibbles about *that* leave. He came back, on a part-time basis, for a couple

of weeks before receiving leave with full pay for his psychological reaction to the cancer. To me, this focuses the question on whether extending the psychological disability leave beyond March 1 was a reasonable accommodation to enable Sanders to perform the essential functions of his job.

Because there is evidence that Sanders wasn't terminated until after Dr. Purviance wrote Arneson that Sanders could return to work April 5, I think there are triable issues whether terminating Sanders instead of extending his leave was discriminatory. While it may turn out that continuing to give Sanders a full, paid leave was not reasonable or was an undue hardship, *see Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 879 n.10 (9th Cir. 1989) (questioning whether second leave is required if first leave proves unsuccessful), *cert. denied*, 498 U.S. 814 (1990); *August v. Offices Unlimited, Inc.*, 981 F.2d 576 (1st Cir. 1992) (no violation when employee given several leaves is still unable to do job at time of termination); *Myers v. Hose.*, 50 F.2d 278 (4 Cir. 1995) (suggesting that reasonable accommodation does not require the employer to wait indefinitely for medical conditions to be corrected, rather that it must be construed as that which "presently" or "in the immediate future," enables employee to perform the job), I cannot say that Sanders has failed to show that it is at least "plausible" that continuing his leave would have given him an opportunity to get through the psychological episode and return to work, *Kimbro*, 889 F.2d at 879.

I would, therefore, reverse and remand for further proceedings.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
SEP 30 1996
Cathy A. Catterson, Clerk
U.S. Court of Appeals

SIDNEY P. SANDERS, JR.,) No. 95-15349
)
Plaintiff-Appellant,) D.C. No. CV-94-00551-SAW
)
v.)
)
ARNESON PRODUCTS, INC.,) ORDER
)
Defendant-Appellee.)

Before: ALARCÓN, BEEZER and RYMER, Circuit Judges

The panel has voted unanimously to deny the petition for rehearing. Judge Rymer votes to reject the suggestion for rehearing en banc and Judges Alarcón and Beezer so recommend.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc. Fed. R. App. p. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FILED
FEB 9 1995
Richard W. Wieking
Clerk. U.S. District Court
Northern District of California

Civil Minutes

Judge Stanley A. Weigel

Date: Feb 9, 1995

Case No.: C 94-551 SAW

Title: Sidney Sanders vs Arneson Products, Inc.

Appearances:

For the Plaintiff's) : Daniel Bacon

For the Defendant(s) : Brian McMillan

Clerk: Max Thomsen Court Reporter: Larry White

PROCEEDINGS

MOTIONS:	**RULING:**
1. Defendant's motion for summary judgment	GRANTED
2.	
3.	
4.	

ORDERED AFTER HEARING/CONSIDERATION:

Case continued to:

FILED
FEB 9 1995
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SIDNEY P. SANDERS, JR.,	) CASE NO. C 94 0551 SAW (JSB)
	)
Plaintiff,	) ORDER
	)
v.	) Hearing Date: February 9, 1995
	) Time: 2:15 p.m.
ARNESON PRODUCTS, INC	) Courtroom: 8, 19th Floor
	) Judge:Honorable Stanley A.Weigel
	) [Trial Date: February 28, 1995]

Defendant's motion for summary judgment and/or, in the alternative. summary adjudication of issues filed in the above-captioned matter pursuant to Federal Rule of Civil Procedure 56 was heard before the Honorable Stanley A. Weigel on February 9, 1995. Plaintiff appeared through his counsel Daniel Ray Bacon, and Defendant appeared through its counsel, Brian T. McMillan, Littler, Mendelson, Fastiff, Tichy & Mathiason.

The Court having considered the papers and pleadings with respect to such motion, the parties having had the opportunity of

oral argument with respect thereto, and good and sufficient grounds appearing therefor,

The Court finds that Defendant is entitled to summary judgment on all Plaintiff's claims for relief stated within his Complaint.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's motion for summary judgment be, and the same hereby is, granted and the Complaint herein is dismissed in its entirety with prejudice. Judgment in favor of Defendant shall be entered accordingly.

Dated: 2/9/95 |S| Stanley A. Weigel
HONORABLE STANLEY A. WEIGEL
JUDGE OF THE UNITED STATES
DISTRICT COURT

UNITED STATES CODE
TITLE 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 126 - EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES

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§ 12101. Findings and purpose

(a) Findings

The Congress finds that -

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing order;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

§ 12101. Findings and purpose

(a) Findings

The Congress finds that -

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

12101. Findings and purpose

(b) Purpose

It is the purpose of this chapter -

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

§ 12102. Definitions

As used in this chapter:

(1) Auxiliary aids and services

The term "auxiliary aids and services" includes -

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability

The term "disability" means, with respect to an individual -

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment.

(3) State

The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

§ 12111. Definitions

As used in this subchapter;

(1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

(2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term "employer" does not include -

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

(6) Illegal use of drugs

(A) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. 801 et seq.). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(B) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C. 812).

(7) Persons, etc.

The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include -
(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship

(A) In General

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include -

(i) the nature and cost of the accommodation needed under this chapter;
(ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such a facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
(iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
(iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to covered entity.

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes -

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training an apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration -

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control.

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)

(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries

(1) In general

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation

(A) Presumption

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on -

(i) the interrelation of operations;
(ii) the common management;
(iii) the centralized control of labor relations; and
(iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to be the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related function.

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if -

(A) all entering employees are subject to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that -

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

4. Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

§ 12113. Defense

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) Religious entities

(1) In general

This subchapter shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) Religious tenets requirement

Under this subchapter, a religious organization may require that all applicants and employees conform to the religious tenets of such organization.

(d) List of infectious and communicable diseases

(1) In general

The Secretary of Health and Human Services, not later than 6 months after July 26, 2990, shall -

(A) review all infectious and communicable diseases which are transmitted through handling the food supply;
(B) publish a list of infectious and communicable diseases which are transmitted through handling the food supply;
(C) publish the methods by which such diseases are transmitted; and

(D) widely disseminate such information regarding the list of diseases and their modes of transmissibility to the general public. Such list shall be updated annually.

(2) Applications

In any case in which an individual has an infectious or communicable disease that is transmitted to others through the handling of food, that is included on the list developed by the Secretary of Health and Human Services under paragraph (1), and which cannot be eliminated by reasonable accommodation, a covered entity may refuse to assign or continue to assign such individual to a job involving food handling.

(3) Construction

Nothing in this chapter shall be construed to preempt, modify, or amend any State, county, or local law, ordinance, or regulation applicable to food handling which is designed to protect the public health from individuals who pose a significant risk to the health or safety of others, which cannot be eliminated by reasonable accommodation, pursuant to the list of infectious or communicable diseases and the modes of transmissibility published by the Secretary of Health and Human Services.

§ 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability

For the purpose of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability and individual who -

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
(3) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity

A covered entity -
(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;
(3) may require that employees shall behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);
(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and
(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that -

(A) employees comply with standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);
(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such and industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such tests results.

(e) Transportation employees

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to -

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and
(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c) of this section.

§ 12115. Posting notices

Every employer, employment agency, labor organization, or joint labor-management committee covered under this subchapter shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this chapter, in the manner prescribed by section 2000e-10 of this title.

§ 12116. Regulations

Not later than 1 year after July 26, 1990, the Commission shall issue regulations in an accessible format to carry out this subchapter in accordance with subchapter II of chapter 5 of title 5.

§ 12117. Enforcement

(a) Powers, remedies, and procedures

The Powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.) shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed. Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.